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AUTHOR Kirp, David L.
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ABSTRACT

This essay takes up two separate but related issues: how the courts have resolved disputes over race and schooling and how they should resolve such disputes. This essay is in reply to a related essay, in which another author identified the consequences of what he perceived as a minimalist judicial role and called for greater exercise of responsibility by the courts. Replying to those assertions, this essay describes the race and schooling issue as at once judicial and political and identifies a role for courts in strengthening a genuinely political process, one which reckons with the wishes of black as well as white constituents. (Author)

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BARNYARD CACAPHONY?
JUDGING AND POLITICKING IN SCHOOL DESEGREGATION

David L. Kirp*

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*The author is Director of the Law Program at the Institute for Research on Educational Finance and Governance, Stanford University.

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ABSTRACT OF "BARNYARD CACAPHONY"

This essay takes up two separate but related questions: How have courts resolved disputes over race and schooling? How should they resolve such disputes? In "Administrative Foxes and Educational Chicken Coops," Daniel Monti identifies the consequences of what he perceives as a minimalist judicial role, and calls for greater exercise of responsibility by the courts. Replying to those assertions, this essay describes the race and schooling issue as at once judicial and political, and identifies a role for courts in strengthening a genuinely political process, one which reckons with the wishes of black as well as white constituents.

David L. Kirp

During the quarter century since the Segregation Cases, debate over race and schooling policy has focused on issues of substance. Attention has been directed to such questions as: Does desegregation improve the educational performance of blacks? Is busing a sensible course of action? These issues reflect a larger conundrum: What should race and schooling policy entail? We are no closer to settling these substantive matters than when they emerged in the wake of Brown. On the contrary, what once seemed a matter of "simple justice" no longer can be so described; research does not answer our queries, but instead poses new ones.

Of late, a second set of questions has surfaced. These center on the process by which policy is made, rather than its substance. As the issue has been joined by lawyers and social scientists, it concerns the distinctive competencies of the courts, on the one hand, the political and administrative processes, on the other, to confront the problem of race and schooling. This discussion too is part of a broader debate over the appropriate roles of the coordinate branches of government in shaping social policy.

"Administrative Foxes in Educational Chicken Coops" contributes in several useful ways to this ongoing discussion. It offers some data, gleaned from a case history. There exist few case studies of school desegregation which do more than chronicle past events, recapitulating newspaper accounts or court records; in that light, the several papers generated by this St. Louis project are a welcome exception. "Administrative Foxes" also confirms

propositions that other scholars, approaching the matter from differing perspectives, have advanced. In 1980, who could dispute that the question of racial justice in the schools is at once legal and political, or that the courts necessarily assume a role that partakes both of politics and law in resolving desegregation disputes?

To identify this nexus between law and politics constitutes a useful first step--but it is only a first step. In the main, I am allergic to political labels, particularly when they substitute for more close-grained analysis. "Administrative Foxes" engages in some of this. The essay contrasts something called a "neo-conservative" critique of the courts' role in desegregation with a preferred and more explicitly political alternative. That tactic, familiar to those who understand the function of straw men in social discourse, distorts the real points at issue; it produces cacaphony in the barnyard, not clarity. What is <u>not</u> in dispute needs to be made clear before one can discuss the more interesting distinctions.

Let me recapitulate the argument. The "neo-conservatives," it is said, would have the courts "stop administering desegregation plans and leave the construction and implementation of such orders in the hands of local officials. . . . If desegregation is to be elevated to its rightful place in the fraternity of issues amenable to popular redress and political resolution, then the courts are not the proper forum through which to fashion a response to the problems posed by segregated school systems." Courts are not good planners, the neo-conservatives supposedly say, for they lack the necessary bureaucratic resources and the political legitimacy

to resolve these questions. Tne judicial activist "waiting to work his mischief on another innocent public institution" ought to be curbed, the neo-conservatives declare.

Bosh, says Mr. Monti--and so do I. Although my essay, "School Desegregation and the Limits of Legalism," is cited as advancing each of these propositions, it does no such thing; it has been transformed in "Administrative Foxes" into a grotesquery. That piece does not urge the withdrawal of the courts from this fray. Instead, it explores more complicated and interesting questions concerning the mix of tasks that courts and other central participants might best perform. The essay does not score judicial activism. It does criticize excessive rule-mindedness and a primary emphasis on uniform solutions in a realm which, in its diversity, seems to call for a mix of the uniform and the specific, a common constitutional standard coupled with specific resolutions which match the needs and wants of particular communities. Racial justice, the essay urges, is necessarily both universalistic and particularistic; it partakes both of pragmatism and principle. For those reasons, the courts may most usefully set in motion "genuinely political local action within broad constitutional guidelines, in which black as well as white voices are heard, [enabling] justice to emerge in the particular." While one may find that formulation of the issue as wanting as that set forth in "Administrative Foxes," it is a very different formulation.

What should be the interplay between law and politics? One place to start is with the data "Administrative Foxes" provides. The

article purports to identify the deficiencies of a weak court order, one which left school districts to their own political devices. This is a strained and strange reading of the story.

What happened bears brief retelling. The court decision which mandated the consolidation of four suburban St. Louis school districts was, in its scope and substance, almost without precedent. The forced merger required changes in almost all aspects of school governance, not just race policy. This is hardly judicial abdication.

Nor did the court confine itself to ordering the school districts to merge. While it relied on officials from the several districts to formulate an initial plan--common practice in this type of litigation--the court modified the plan which emerged in several significant respects. In particular, it insisted on more integration. As a result, the largest of the merged districts, previously "largely" white, apparently acquired a 30 percent black enrollment (I say "apparently" because exact figures are not given). That seems a significant change, despite the attempt in "Administrative Foxes" to down-play it.

The mechanisms established to oversee the decision--a biracial advisory committee and an Emergency School Assistance Act (ESAA) advisory committee--are attacked as ineffective. Yet the ESAA group vetoed an educational center when it became clear that only black children would be served by it: What better measure of political effectiveness might one hope for? And less than two years after the initial desegregation plan had been put into effect, "black students and parents . . . made their first tentative efforts to mobilize themselves and redress their grievances on issues ranging from teacher transfers to the proposed gutting of the

black studies curriculum." In brief, the black community was organizing itself into a coherent political force. Blacks may not always prevail--but then, few blocs constituting 30 percent of the relevant constituency always prevail.

As I read this history, it reveals an institutionally healthy joining of the court with the coordinate branches of government. The court both framed the constitutional standard and nudged the political apparatuses into a decision, consistent with constitutional doctrine, that made sense to the participants. The outcome is hardly perfect. The judicial decision does not solve the educational problems of these several affected districts, nor does it assure that the wisest policies concerning race and schooling will prevail. Those facts, however lamentable, are beside the point. We lack an elixir, a cure-all for the educational ailments of urban school systems; it is unsurprising that this court didn't invent one. No doubt, as is suggested, blacks still fare relatively badly in the schools of the merged district, but that outcome should not be laid at the door of the court. All that we know about implementation cautions us against the belief that <u>any</u> outside authority--legislature, administrative agency, or court--could manage the affairs of a school district, even if it wished to. It is, in short, hard to know just what more the court might usefully have done.

In the Ferguson-Florissant case as in a number of other desegregation suits, the court deviated from the conventional norms of judicial behavior. The court did not order a clear-cut one-time remedy. Instead, remedy-setting became a phase of the litigation, affording the contending interests an opportunity to work through a workable and constitutionally permissible decision. The process

functioned iteratively: the court invited the school districts to frame a proposal, encouraging negotiation and compromise, then modified that order. Nor did the remedial phase end with the issuance of the order. The judicially-created advisory committee (quite like the analogous mechanisms adopted in other cases) monitored the impact of the policy change; it would also propose adjustments. Where such institutional innovations work well, they permit policy learning to take place.

What broad policy options exist? If the present frustrates, alternatives come to look attractive. One could conceivably turn questions of race and schooling entirely over to the courts. Proponents of a "juridical democracy," who neatly distinguish the provinces of law and politics, have urged as much. The problem, though, is that law and politics cannot be so disentangled. Questions of race and schooling necessarily have political, educational, and ethnical as well as constitutional dimensions, and for that reason appropriately draw all of the branches of government into their resolution.

Courts could also conceivably withdraw from this fray, leaving the implementation of broad constitutional principles entirely in the hands of the politicians. Only in the United States do the courts have such a strong voice in declaring and implementing social policy. Perhaps that is not the wisest approach; perhaps we would be better served to emulate the British, and turn the judiciary into truly the "least dangerous branch." That possibility,

however, is equally unattractive. Because race and schooling issues implicate constitutional values which transcend day-to-day politicking, and because these values get realized not just in the sweeping statement but also in the detail, the courts have a necessary and proper place in their resolution. Moreover, as the reanalysis of Ferguson-Florissant suggests, courts may usefully shape the bargaining among the partisans.

The most sensible course for policy in this realm entails maintaining and strengthening the emerging linkages between law and politics. The line between process and substance as elements of a desegregation remedy needs further blurring. A new political regime, called into being by the efforts of the court and operating within the constitutional parameters set by the court, develops a remedy. It is, to a considerable extent, the process from which that remedy emerges, rather than its substantive particulars, which secures its legitimacy; several courts, among them the California Supreme Court in the Los Angeles case, have said as much. As "Administrative Foxes" suggests, "if . . . the process through which desegregation policies are fashioned is the key to their success or failure, then our definition of desegregation reforms must be broadened to include procedural reforms which will assure that all parties with a stake in the outcome at least have the chance to be effectively represented in the policy making process."

Restructuring the decision-making process in schools in order to give constituents a fuller voice is a familiar aspiration. But the hope for reform in the way decisions concerning race and schooling

get made is not a "Fabian pipe dream." Such reform can be detected, at least in nascent form, if one looks closely at what has transpired in any of the Northern cities which have lately been involved in desegregation litigation. This change deserves to be noticed--and cheered. What happens next: Will courts self-consciously and more effectively address the "representativeness" of the political decision-making apparatus? Can they do, and still remain true to their roles as courts? Will those not directly affected by the litigation treat the new politicization that follows these suits as a boon or bane? These remain the interesting and unanswered questions.